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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1418

CONSOLIDATED MOTOR INNS, *Petitioner,*

v.

ALIAS ENTERPRISES, INC., *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF BVA CREDIT CORPORATION

BVA CREDIT CORPORATION'S BRIEF IN RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL M. DANIELL
1200 Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303

Attorney for
BVA Credit Corporation

Of Counsel:

RALPH B. MATTHEWS
1200 Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303

Of Counsel:

ARTHUR B. SEYMOUR
1200 Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

NATURE OF INTEREST

BVA Credit Corporation, (hereinafter "BVA") respectfully moves for leave to file the annexed brief, as Amicus Curiae, in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Consolidated Motor Inns (hereinafter "CMI"). Consent to file a brief *Amicus Curiae* has not been given to BVA; this Motion for Leave to File Brief Amicus Curiae is made pursuant to Rule 42.

BVA is a creditor of CMI, a Georgia limited partnership, which filed a petition under Chapter XII of the Bankruptcy Act, 11 USC § 1 et. seq., including but not limited to 11 USC §§ 801 through 926 and the Rules of Bankruptcy Procedure. BVA is also a creditor of

the individual general partners of CMI and their spouses. BVA's annexed brief is limited to the question of bankruptcy jurisdiction of the aforesaid individual partners and their spouses.

FACTS NOT ADEQUATELY PRESENTED

The issue of the bankruptcy jurisdiction arises from the fact that, although the individual partners and their spouses did not file petitions in bankruptcy, never submitted their individual estates to a bankruptcy court, and never came under the personal jurisdiction of a bankruptcy court, they nevertheless received a discharge in bankruptcy from the Bankrupt Court of the Northern District of Georgia, Atlanta Division (hereinafter "Bankruptcy Court") by a Confirmation of Arrangement (hereinafter "Arrangement") dated October 15, 1975 (Pet.App. 1a-8a) which discharged the CMI limited partnership entity.

RELEVANCY

BVA is a creditor of the individual partners of CMI and their spouses by virtue of bilateral contracts of Individual Guaranty executed by the individual partners and their spouses whereby they unconditionally guaranteed payment of an Equipment Lease contract which was executed by CMI. Said contracts of Individual Guaranty provide that (1) the contracts are to become effective and that payment of the Equipment Lease contract is to be made by the individual partners and their spouses if (2) CMI defaults in any of its obligations to BVA and if (3) a petition under any chapter of the Bankruptcy Act, as amended, is filed by CMI.

CMI, but not the individual partners or their spouses, filed a petition for an Arrangement under Chapter XII of the Bankruptcy Act on January 23, 1975. No petition in bankruptcy has been filed by the individual partners and their spouses. No payment has been made to BVA on the aforesaid contracts of Individual Guaranty.

However, the Arrangement discharging CMI purports to extend to the individual general partners and their spouses; it also provides an additional method for their discharge if payment under the Arrangement is accepted by any creditor (Pet. App. 7a).

BVA refused payment under the Arrangement. BVA did not appeal the Arrangement. BVA is not contending that the CMI partnership entity should not be discharged by the Arrangement.

BVA is suing the individual partners and their spouses for a deficiency judgment on the contracts of Individual Guaranty in the amount of $325,785.28 plus costs, interest and attorney's fees in the United States District Court for the Northern District of Georgia, Atlanta Division (hereinafter "District Court").

Therefore, bankruptcy jurisdiction over the individual partners and their spouses, not the vacation of an order, is the true concern of CMI. By appeal to this Honorable Court CMI seeks to vacate the Order of the District Court entered on February 20, 1976 (Pet. App. 9a-15a). The District Court order, which CMI seeks to vacate is the result of an appeal by another creditor of CMI, Respondent, Alias Enterprises, Inc.'s predecessor, Brand Development Corp. This order determined the Arrangement's purported discharge of the indi-

vidual partners and their spouses was void. There was no discharge of the individual partners and their spouses; they filed no petition in bankruptcy.

The determination of the District Court, that the individual partners and their spouses were not discharged, caused CMI's appeal to the United States Court of Appeals for the Fifth Circuit (hereinafter "Court of Appeals"). The Bankruptcy Act § 5j, (11 USC 23j), federal and Georgia case law apply the entity theory of partnership. *Liberty National Bank* v. *Bear,* 276 U.S. 215, 222, 226, 72 L.Ed. 536, 48 S.Ct. 252 (1928); *Mitchell* v. *Hampell,* 276 US 299, 72 L.Ed. 582, 48 S.Ct. 308 (1928); *Rowland* v. *Lovett,* 45 Ga. App. 123, 163, S.E. 511 (1932); *In Re Sugar Valley Gin Co.,* 292 F.508 (N.D. Ga. 1923); *In Re Deadwyler,* 292, F. 510 (N.D. Ga. 1923). Therefore, under law, without the protection of the bankruptcy stay, the individual partners remain liable to CMI creditors who have not accepted checks representing payment under the Arrangement. (Pet. App. 7a).

Having accepted no payment under the Arrangement BVA continues to be a creditor of the individual partners and their spouses who are continuing to attempt, by appellate process, to come within the protection of the bankruptcy stay by vacating the District Court's February 20, 1976 Order (Pet. App. 9a-15a). The individual partners and their spouses are again trying to become bankrupts who have filed no petition in bankruptcy.

CMI's petition is based on illusary procedural issue. CMI ignores the plain answer that in void judgments there is no fact, issue, holding or res judicata to set aside. The only question to determine is whether the

order is truly void. That issue, which has not been presented by CMI, is best determined by a trial court where all of the particular facts can be examined.

BVA, the only party who has an interest as a Respondent, respectfully requests that it be allowed to file its annexed brief. The Respondent, Alias Enterprises, Inc., who moved the Court of Appeals to dismiss CMI's appeal on the grounds of mootness, has settled all claims against the individual partners (Pet. App. 31a).

WHEREFORE, BVA, as an *amicus curiae,* prays that: BVA Credit Corporation's Brief in Response to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be allowed filed.

PAUL M. DANIELL

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NATURE OF INTEREST

BVA Credit Corporation (hereinafter "BVA") is a creditor of the Petitioner, Consolidated Motor Inns (hereinafter "CMI") a Georgia limited partnership which filed a petition under Chapter XII of the Bankruptcy Act, 11 USC § 1, et. seq. including but not limited to 11 USC §§ 801 through 926, and the Rules of Bankruptcy Procedure. BVA is also a creditor of CMI's individual general partners and their spouses.

BVA is involved in two other legal actions, in addition to the case at bar, arising out of the CMI bankruptcy.

BVA is suing the individual partners and their spouses for a deficiency judgment on contracts of Individual Guaranty. These contracts guaranteed BVA payment of an Equipment Lease BVA had with CMI. Payment by the individual partners and their spouses was to be made to BVA in the event CMI defaulted in any payment obligation to BVA, or CMI filed a petition under any chapter of the Bankruptcy Act, 11 USC § 1 et. seq. BVA's suit against the individual partners and their spouses is in the United States District Court for the Northern District of Georgia, Atlanta Division (hereinafter "District Court").

BVA is also presently an appellee in this District Court in a CMI appeal from the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (hereinafter "Bankruptcy Court") (Pet. App. 45a). This appeal is from an Order of the Bankruptcy Court, dated February 14, 1978, entered to comply with the remand contained in the Order of the District Court dated February 20, 1976 and states: "Ordered that the Bankruptcy Court has no jurisdiction to discharge or injoin the creditors of the non-petitioning individual partners and their spouses . . . ." (Pet. App. 42a).

Therefore, including the case at bar, which arises from a CMI Motion to Vacate denied by the United States Court of Appeals for the Fifth Circuit (hereinafter "Court of Appeals") three courts have before them the question of bankruptcy jurisdiction over the non-petitioning individual partners of CMI and their spouses.

QUESTION PRESENTED

When an appeal arising out of a Bankruptcy Court order is dismissed for mootness, on the motion of a creditor/appellee, is the Court of Appeals required, on the subsequent motion of the appellant/debtor, to vacate the District Court order which holds certain provisions of a Bankruptcy Court order, discharging non-petitioning debtors, are void?

ARGUMENT

Simply stated the issue is: Whether it is necessary for a higher appellate court to vacate a lower appellate court order which holds that part of a trial court's order is void?

1. The District Court was sitting as an appellate court when it entered the Order of February 20, 1976 which CMI moved the Court of Appeals to vacate. As an appellate court, the District Court determined the Confirmation of Arrangement (hereinafter "Arrangement") of CMI was void as it purported to discharge the non-petitioning general partners and their spouses. That is, since the individual general partners and their spouses had filed no petition in bankruptcy they had no standing to receive a discharge. *Gross* v. *Irving Trust Co.*, 289 US 342, 344 77 L.Ed. 1243, 53 S.Ct. 605 (1933); *Meyers* v. *International Trust Co.*, 273 US 380, 385, 71 L.Ed. 692, 49 S.Ct. 372 (1927); *May* v. *Henderson*, 268, US 111, 117, 69 L.Ed. 870, 45 S.Ct. 459 (1925); *Cumberland Glass* v. *DeWitt*, 237 US 447, 452, 52 L.Ed. 1042, 35 S.Ct. 636 (1915); *Acme Harvester Co.* v. *Beckman Lumber Co.*, 222 US 300, 306, 56 L.Ed. 208, 32 S. Ct. 99 (1911); *Seiden* v. *Southland Chenilles*, 195 F.2d 899, 903 (5th Cir. 1952); *In Re Walker Grain Co.*, 295 F. 120, 122 (5th Cir. 1923) cert. denied 264 U.S. 588, 68 L.Ed. 864 (1924); *Pugh* v. *Loisel*, 219 F. 417, 421 (5th

Cir. 1915) cert. denied 238 US 631, 59 L.Ed. 1497; *Smith* v. *Burman,* 8 Ga. App. 262, 68 S.E. 1014 (1910).

2. It should be recognized that CMI's appeal became moot through CMI's own actions. CMI's brief to the Court of Appeals made no mention of BVA although the Court of Appeals' local Rule 13(a), as provided by Rule 47 of the Federal Rules of Appellate Procedure, required CMI to furnish a complete list of all persons, associations of persons, firms, partnerships or corporations which have an interest in the outcome of the case. Had CMI complied with this local rule they would not be in the dilemma they are in today. The Court of Appeals would have realized a "substantial controversy" existed which required relief. *North Carolina* v. *Rice,* 404 US 244, 246, 30 L.Ed. 2d 413, 415-416, 92 S.Ct. 402, 404 (1971).

On the basis of CMI's motions and certificate of interest showing there were no other parties concerned the Court of Appeals determined the District Court's order should be left intact. The Court of Appeals was of the opinion, based on the record, that there were no issues in the case to be tried and that the appellant brought about mootness by entering into an agreement with the appellee.

From the conditions and circumstances of this particular case the Court of Appeals did not violate the policy of dismissing a lower court order in cases which are moot. *United States* v. *Hamberg-Amerikanische Packet-Fahrt-Actien Gesellschaft,* 239 US 466, 477-478, 60 L.Ed. 387, 36 S.Ct. 212 (1916); *South Spring Hill Gold Min. Co.* v. *Amador Medean Gold Co.,* 145 US 300, 36 L.Ed. 712, 12 S.Ct. 921 (1892). By the nature of the case and the briefs before them the Court of Appeals did recognize that the District Court affirmed in part and voided in part the Confirmation of Arrangement (hereinafter "Arrangement") of the Bankruptcy Court. Accordingly, the Court of Appeals did what was "most consonant to justice", *United States* v. *Hamberg-Amerikanische, supra* at page 478, under the circumstances and dismissed CMI's appeal without opinion. The doctrine of res judicata then went to the portion of the District Court Order of February 20, 1976 which affirmed the discharge of the CMI partnership entity (Pet. App. 9a-15a).

The record indicated nothing further in the case needed to be done. The Court of Appeals knew the Arrangement (Pet. App. 1a-8a) was void as to the individual partners and their spouses who had not filed a petition in bankruptcy. There was no res judicata issue as there was no bankruptcy jurisdiction. Void judgments create no legal obligation on the parties and are legally ineffective. *Rose* v. *Himely,* 4 Cranch 241, 269, 2 L.Ed. 608, 617 (1808); *Thompson* v. *Whitman,* 18 Wall. 457, 468 21 L.Ed. 897, 901 (1874); *Windsor* v. *McVeigh,* 93 US 274, 283 23 L.Ed. 914 (1876); *Pennoyer* v. *Neff,* 95 US 714, 728, 24 L.Ed. 565 (1878); *Old Wayne Life Association* v. *McDonough,* 204 US 8, 16, 51 L.Ed. 345, 27 S.Ct. 236 (1907); *Whitmore* v. *Karrick,* 205 US 141, 149, 51 L.Ed. 745, 27 S.Ct. 434 (1907); *McDonald* v. *Mabee,* 243 US 90, 93, 61 L.Ed. 608, 37 S.Ct. 343 (1917); *Kalb* v. *Feuerstien,* 308 US 433, 439, 84 L.Ed. 370, 60 S.Ct. 343 (1940); *Bass* v. *Hoaglan,* 172 F.2d. 205, 210 (5th Cir. 1949) cert. denied 338 US 816, 94 L.Ed. 494, 70 S.Ct. 571 (1949).

3. Interestingly, *United States* v. *Munsingwear,* 340 US 36, 39-40, 95 L.Ed. 36, 71 S.Ct. 104 (1950), which CMI relies in their argument to vacate, is excellent authority not to vacate the District Court order.

In his opinion Mr. Justice Douglas refers to the authority of *Southern Pacific Railroad Co.* v. *United States,* 168 US 1, 48-49, 42 L.Ed. 355, 18 S.Ct. (1897) to relate the doctrine of res judicata to cases which are moot and points out the prerequisite of res judicata is jurisdiction:

> "The general principal announced in numerous cases is that a right, question or fact, distinctly put in issue and directly determined by a *court of competent jurisdiction* (emphasis added) as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The District Court order which CMI seeks to vacate (1) stands for the proposition that the Bankruptcy Court was not a court of "competent jurisdiction" as the individual partners and their spouses had not filed petitions (2) specifically provides that injunction entered pursuant to the discharge of the individual partners and their spouses is void and of no effect (3) removes the precedential effect of those provisions of the Arrangement discharging the individual partners and their spouses which the Bankruptcy Court had no power to make, and (4) applies the spirit and intent of *United States* v. *Munsingwear, supra* at page 60 by clearing "a path for further re-litigation".

The District Court, sitting as an appellate court, properly exercised its authority provided at 28 USC § 2106 which states:

> "The Supreme Court or any other appellate jurisdiction may affirm, modify, vacate, set aside or revise any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The District Court order which CMI seeks to vacate appropriately remanded the case to the Bankruptcy Court. The result was the Bankruptcy Court Order of February 14, 1978 which CMI is presently appealing to the District Court (Pet. App. 45a). In light of CMI's appeal, clearly the Arrangement entered by the Bankruptcy Court, as it has been modified by the Bankruptcy Court order of February 14, 1978 (Pet. App. 41a-44a) does not stand as a barrier against creditors who have not accepted payment under the Arrangement made with checks containing a restrictive endorsement (Pet. App. 7a).

As the discharge of the individual partners and their spouses is void Federal Rules of Civil Procedure Rule 60(b)(4) provides relief for those creditors who have not accepted payment under the Arrangement as this rule provides:

> "On motion and on terms as are just, the court may relieve a party . . . from a final judgment, or proceeding for the following reasons . . . (4) the judgment is void . . . ."

Rule 60(b)(4) is applied to the Bankruptcy Act by Bankruptcy Rule 924. Therefore there is no necessity to vacate the District Court Order of February 20, 1976. The path to further re-litigation is clear.

CONCLUSION

On the basis that there was no bankruptcy jurisdiction of the parties in interest who have filed this Petition, and that the portion of the District Court Order of February 20, 1976, which discharged the partnership entity need not be vacated, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

However, if vacation is to be granted, BVA respectfully requests that the October 15, 1975 Bankruptcy Court Confirmation of Arrangement also be vacated, totally or as to those provisions that discharged the non-petitioning individual partners and their spouses.

WHEREFORE, BVA prays:

1. That the Writ of Certiorari be denied, or,

2. That both the District Court Order and the Bankruptcy Court Order Confirmation of Arrangement be vacated, or,

3. That the portions of the Bankruptcy Court Confirmation of Arrangement which discharges the non-petitioning individual partners and their spouses be vacated.

Respectfully submitted,

PAUL M. DANIELL
1200 Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303

Attorney for
BVA Credit Corporation

Of Counsel:

RALPH B. MATTHEWS
1200 Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303

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ARTHUR B. SEYMOUR
1200 Gas Light Tower
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